OCT 29 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 532

JOHN J. MURPHY,

Petitioner,

v.

CHARLES E. WILSON, Secretary of Defense, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Involved 2

Statutes and Regulations Involved 2

Statement of the Case 7

Specifications of the Errors to be Urged 9

Reasons for Granting the Writ 9

Cases Cited

Bailey v. Richardson, 341 U.S. 918, 95 L.Ed. 1352 12

Englist v. Long Beach, 35 Cal. 2d, 155, 217 Pac. 2d, 22, 18 ALR 2d 547 14

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L.Ed. 817 11

Lloyd Sabaudo Societa Anonima v. Eiting 287 U.S. 329, 77 L.Ed. 341 13

42 Am. Juris, page 483, Par. 139, and cases cited 13

42 Am. Juris, par. 135, page 470 13

United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 94 L.Ed. 317 13

Statutes

Title 5—U.S.C. 652 ..... 2, 3

Title 5—U.S.C. 863 ..... 3, 4

Regulations

Regulations United States Civil Service Commission 4, 5, 6, 7

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

JOHN J. MURPHY,

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v.

CHARLES E. WILSON, Secretary of Defense, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, John J. Murphy, Appellant below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 12, 1956 (A.4).

OPINIONS BELOW

The United States District Court for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported but is set forth on pages 1-3 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on July 12, 1956 (A.4). A petition for rehearing was timely filed on July 27, 1956, and this petition for rehearing was denied on August 6, 1956 (A.6). This petition for certiorari is filed within ninety days thereafter in accordance with the provisions of Title 28 U.S.C. Section 2101(c).

QUESTIONS INVOLVED

1. Whether the petitioner, a permanent civil service employee of the United States, and a veteran preference eligible, may be involuntarily retired by the United States Civil Service Commission from his governmental position with the United States without a hearing, and upon alleged evidence contained in his file all of which was held to be secret.

2. Whether a permanent civil service employee of the United States is entitled to a hearing in a proceeding for his involuntary retirement from governmental service, and to know the evidence which is the basis of the request for his involuntary retirement.

3. Whether the petitioner could be denied a hearing on the request for his involuntary retirement from governmental service when it long since had been the practise and custom of the United States Civil Service Commission to permit hearings in such cases.

STATUTES AND REGULATIONS INVOLVED

Title 5—U.S.C. 652—

> Removal without pay from classified civil service—Only for cause; notice; copy of charges; time to answer; examination; record; persons exempt

(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

(As amended June 10, 1948, c. 447, 62 Stat. 354)

5 U.S.C. 863

"No permanent or indefinite preference eligible, who had completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore preferred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can

be imposed), stating any and all reasons, *specifically and in detail,* for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative office and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, c. 287, Sec. 14, 58 Stat. 390)

UNITED STATES CIVIL SERVICE COMMISSION

Retirement Division
Washington 25, D. C.

Rules Governing Appeals

Rule 1. An Appeal may be taken to the Board of Appeals and Review, Civil Service Commission from the final action or order of the Retirement Division affecting the rights or interest of any person or of the United States under the civil-service retirement law, except as provided in rule 11, below.

Rule 2. Appeals must be filed by a claimant or a duly accredited representative, but no appeal shall lie to the

Commission's Board of Appeals and Review until action has been completed by the Retirement Division. An appeal taken in behalf of a claimant by or through a representative who is not recognized by the Commission, or whose recognition has been canceled, shall not be entertained.

Rule 3. (a) Except as hereinafter order, the time for filing an appeal shall be not later than six months from the date of mailing notice of the final action or order of which complaint is made,

(b) In applications for disability retirement made by a department or establishment of the Government the time for filing an appeal shall be not later than 30 days from date of receipt of notice of final action or order.

(c) In cases of disability annuitants who are found upon medical examination to have recovered, the time allowed for filing an appeal shall be no later than 90 days from the date of final notice of proposed discontinuance of annuity.

(d) In simultaneously contested claims, where one is allowed and one rejected, the time allowed for the filing of an appeal shall be not later than 60 days from the date of receipt of notice of the Commission's action by the claimant to whom the action is adverse. Upon the filing of an appeal all parties, other than the appellant, whose interests may be adversely affected by the decision shall be notified by registered letter of the filing of the appeal and of the substance thereof and allowed 30 days from the date of the receipt of such notice within which to file brief or argument in answer thereto before the papers are forwarded to the Board of Appeals and Review. The return of a registered letter unclaimed, containing notice, addressed to the last known post-office address, shall constitute sufficient evidence of notice.

Rule 4. Each appeal shall show the name and post-office address of appellant, his retirement claim number, the date and substance of the action from which the appeal is taken, and full reasons for the appeal.

Rule 5. No appeal will be entertained that is not in conformity with rules 2 to 5, inclusive. In cases where

new and material evidence has been added to the record after appeal has been filed with the Board of Appeals and Review, the entire record shall be returned to the Retirement Division with an expression of the Board's opinion as to the action which should be taken. The case shall then be further considered by the Retirement Division and if the final action proposed by that Division is at variance with the opinion of the Board of Appeals and Review the case shall be forwarded to the Commissioners for decision.

Rule 6. Whenever the Board of Appeals and Review deems it necessary or desirable to secure additional information or documentary evidence with respect to a ~~formation or documentary evidence with respect to a~~ pending appeal, the Board may, in its discretion, forward the file in the case to the Retirement Division with a statement concerning the character of the information or evidence desired, and that Division shall, upon request of the Board, take the necessary action to obtain such information or evidence. Upon receipt of the information or evidence, it shall be returned to the Board of Appeals and Review and the procedure prescribed in rule 5 shall thereafter be followed.

Rule 7. Appeals shall be docketed in the order of their receipt by the Board of Appeals and Review and so far as practicable shall be considered in the same order.

Rule 8. In proceedings before the Commission in which it shall be decided that a party has no right to appeal or that said appeal may not be entertained under the provisions of these rules, such party may appeal to the Commissioners for an order directing the Retirement Division to forward the record to the Board of Appeals and Review. Such application shall be in writing and shall fully and specifically set forth the grounds upon which the request is based. If upon consideration the application is granted, jurisdiction shall vest in the Board of Appeals and Review to dispose properly of the case.

Rule 9. The mandate of the decision by the Board of Appeals and Review shall be carried into effect within 60 days from the date of the receipt of notice of the

decision by the Retirement Division (except as provided in rule 10), unless the decision shall sooner be recalled. A proper explanation of the decision rendered shall be mailed to the appellant and/or his duly authorized representative by the Board of Appeals and Review.

Rule 10. In any case involving conflicting claims of two or more parties wherein, under rule 3, the time allowed for appeal is limited to 60 days, there shall be a stay of execution of the decision of the Board of Appeals and Review until the expiration of the period of 30 days within which a motion for reconsideration may be filed.

Rule 11. No appeal will be considered by the Civil Service Commission to review the decisions of the Secretary of the Interior prior to July 21, 1930, or of the Administrator of Veterans' Affairs prior to September 1, 1934, on civil-service retirement cases except where upon the basis of newly discovered material evidence, the case has been reconsidered by the Retirement Division. In the latter event, the rules set forth above shall apply.

Rule 12. When appeals require the preparation of formal opinions for submission to the Commission, or the opinions contemplate reversal of the original actions, such opinions shall be forwarded to the Board of Appeals and Review through the Chief of the Retirement Division and the Executive Director and Chief Examiner to the Commission.

STATEMENT OF THE CASE

The petitioner, a permanent civil service employee of the United States, and a veteran preference eligible, brought this suit against the Secretary of Defense, The Secretary of the Army, and the members of the United States Civil Service Commission to compel his reinstatement to his governmental position and to enter a declaratory judgment fixing and determining his rights as a veteran preference eligible with a permanent status in the employment of the United States. (J.A. 7-12) The facts in the case are undisputed.

The petitioner served in the armed forces of the United States from March 17, 1943 through June 23, 1945. He entered the employment of the United States as a civilian employee at the Brooklyn Army Base on December 31, 1948, and thereafter being continuously employed he acquired a permanent status as a civil service employee on December 31, 1949. He received several promotions, and on February 28, 1954 his job position was classified as a Time and Activity Clerk (Contract Services) and he continued in this job position until he was relieved of his duties.

On May 7, 1954 the petitioner received a notice that it had been determined that he was not fit for duty, and there was enclosed with this notice from his superiors a form 2801 which was an application for retirement. He was requested to complete the form so that he could be retired from governmental service. The petitioner refused to complete the form, and thereafter the superiors of the petitioner requested his involuntary retirement. The petitioner was retired upon an alleged finding of the Chief of the Retirement Division of the United States Civil Service Commission rendered on June 8, 1954. The petitioner, as he had a right to do under the regulations of the U. S. Civil Service Commission, appealed the decision to the Board of Appeals and Review of the said Civil Service Commission, and on August 17, 1954 duly demanded that he be given a right to examine the evidence of record supporting the decision for his involuntary retirement, and any evidence of record so that he could properly prosecute his appeal. The request for such evidence was in all things denied, and the petitioner was also denied a hearing by the U. S. Civil Service Commission, and no hearing in fact was ever held on the request of his superiors for his involuntary retirement.

The decision of the Board of Appeals and Review of the Civil Service Commission affirmed the prior decision that the petitioner be involuntarily retired. The petitioner was so retired by the decisions heretofore referred to, and without a hearing, and without having even the slightest knowledge of what evidence was in his file which was the basis of the decisions against him, and without even being given an opportunity to refute the evidence or to even hazard a guess as to what evidence was of record against him.

SPECIFICATIONS OF THE ERRORS TO BE URGED

The petitioner will argue that before he could be legally involuntarily retired from his governmental position which he held as a permanent civil service employee with veteran's preference, he was entitled to a hearing, and to know the evidence offered in support of the claim for involuntary retirement so that he could properly defend himself against the request for involuntary retirement. That even though he was not entitled to a hearing, he was entitled to examine the files containing the evidence in support of the request for his involuntary retirement so that he could properly refute such evidence by competent evidence filed on his behalf.

The petitioner will further argue that since it had long since been the practice and custom of the United States Civil Service Commission to hold hearings in involuntary retirement cases, he was entitled to the same treatment as other employees received in like cases.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted under subdivision (b) of Part V of Rule 19 of this Court for the reason that the Court below has

decided an important question of federal law which has not been, but should be, settled by this Court. The Court of Appeals below has decided a question of law which may affect the status and the rights of over two million civil service employees of the United States.

The Court below held that a permanent civil service employee with veteran's preference may be summarily retired from governmental service without a hearing, and without the slightest knowledge of the evidence upon which the decision was predicated.

The petitioner, a young man in his early thirties in good health mentally and physically as far as being able to discharge the duties imposed upon him, was summarily dismissed from active government service. Based upon secret evidence contained in his file and an alleged medical report which likewise was secret and undisclosed to him, he was involuntarily retired. No more arbitrary or capricious action on the part of government officials could possibly be imagined. The decision below will apply to all future applications for involuntary retirement and thus large numbers of employees may possibly be involuntarily retired unless this Court grants some relief, and establishes a rule of law that such employees have a right to a hearing, or to at least know the evidence which is the basis for the request for their involuntary retirement.

The petitioner has inserted in this petition the rules of the United States Civil Service Commission (Br. 4-7). The Court will note that the rules permit an appeal from the Order of the Retirement Division of the United States Civil Service Commission to the Board of Appeals and Review of the said Commission.

The petitioner frankly admits that in the Retirement provision of the laws relating to Civil Service employees there is no statutory provision which provides for a hearing before the Commission in retirement cases. The true fact is however that for many years the United

States Civil Service Commission has held such hearings and even permitted testimony to be given by medical experts before the Board of Appeals and Review, several of which counsel for the petitioner appeared for the appellants in such proceedings. This established practice and custom of the Civil Service Commission has continued for many years, and yet the petitioner was denied such a hearing, and denied even an opportunity to examine any evidence filed against him in order that he might have properly refuted such evidence.

The petitioner invites the Court's attention to the fact that Congress of the United States has provided that a veteran preference employee cannot be discharged, reduced in rank or grade without a hearing. (See Section 14 of the Veterans Preference Act. Br. p. 3). Congress has further provided that a permanent civil service employee who does not have veterans preference is likewise entitled to some sort of a hearing with the right to file affidavits in his behalf prior to being discharged from government service. (See Br. p. 2-3)

The petitioner contends that inasmuch as the regulations of the United States Civil Service Commission permit an appeal to the Board of Appeals and Review from the decision of the Chief of the Retirement Division of the Commission, the conclusion must be reasonably reached that the employee at least should have some knowledge of the contents of his file upon which to base his appeal, otherwise he is appealing from a decision which is predicated upon evidence of which he has no knowledge. If the right of appeal exists as it does under the regulations to be consistent with fair play and equity, the employee should be apprized of the evidence against him so that he may properly prosecute his appeal.

In the case of Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L.Ed. 817, this Court held that the organization could not be declared a subversive

and placed on the Attorney General's list in that category without a hearing.

This Court, by a divided four to four vote, sustained the Loyalty Board in the case of Bailey v. Richardson, 341 U. S. 918, 95 L.Ed. 1352.

In this case the petitioner is a loyal American Citizen who served his country with honor during a war period, and if citizens whose activities lean toward disloyalty have rights then this petitioner should have some rights as a patriotic American citizen.

The cloak of protection which Congress of the United States has thrown around civil service employees first by the provisions of Section 652 of Title 5 of the United State Code, and secondly by the provisions of Section 14 of the Veterans Preference Act contained in Section 863 of Title 5 of the United States Code afford concrete evidence that Congress never intended that any civil service employee of the United States could be summarily dismissed from governmental service except when charged with a crime, which factor is not present in this case.

The fact that the statutes relating to retirement cases of civil service employees do not specifically provide for a hearing does not foreclose the right to such a hearing. In truth and fact, such hearings have been permitted by the United States Civil Service Commission but they were denied to the petitioner. The Commission could have well established such hearings as it was empowered to promulgate any reasonable regulations to carry out the provisions of the Civil Service laws of the United States, Title 5, U. S. C. 22.

Employees of the United States in cases such as this petitioner are entitled to the same fair treatment, that is to say if one employee receives a right to a hearing in this type of a case, a hearing should be granted to all persons in like cases.

The petition for rehearing in the Court below brought clearly to the attention of the Court of Appeals this question of according hearings to some employees in similar cases as this petitioner but the denial of the same to the petitioner. Yet the Court below denied the petition for rehearing.

If the petitioner was entitled to a hearing, the general rule of law is that the right to a hearing also embraces the right to know the claim of the opposite party.

42 Am. Juris, page 483, Par. 139, and cases cited.

This Court by a minority held in the case of United States ex rel Knauff v. Shaughnessy, 338 U. S. 537, 94 L.Ed. 317, where the petitioner sought relief from an order of the Director of Immigration and Naturalization excluding her from the United States that she was not entitled to a hearing. Three of the Justices of this Court dissented, and two Justices did not participate. Three Justices, Black, Frankfurter and Jackson in a well written opinion dissented and stated that Congress never intended that the wife of an American Citizen without notice of charges, evidence of guilt, and a chance to meet the charge should be excluded.

The petitioner therefore contends because of the protection which Congress has thrown around civil service employees, it was never intended that such employees could be summarily involuntarily retired without a hearing, and without knowing the evidence in support of the request for such retirement.

Although a statute reposing power in an administrative officer to determine a certain question it has been held that a hearing is required even though there is no express requirement thereof.

42 Am. Juris par. 135, page 470
Lloyd Sabaudo Societa Anonima v. Eiting 287 U. S. 329, 77 L.Ed. 341

There are no decided cases except the decision of the Court below on exactly the same legal question as is involved in this case. There is, however, a State decision in point. The case of *English v. Long Beach, 35 Cal. 2d 155, 217 Pac. 2d, 22, 18 ALR 2d 547* appears to be directly in point. In that case the Municipal Civil Service Board of the City of Long Beach sustained the dismissal of a patrolman on the grounds that he was physically unable to perform his duties. In reaching this decision, the board considered medical evidence taken by some of its members outside the hearing and in the absence of the patrolman and his attorney. The patrolman obtained a writ of mandamus annuling the board's order and compelling his reinstatement. The Supreme Court of California held that the patrolman was entitled to a fair hearing which he did not receive and affirmed the judgment of the Court below ordering the patrolman to be reinstated.

In the interests of right and justice this petition for a writ of certiorari should be granted otherwise any of the two million government employees may be involuntarily retired with no opportunity at all to defend themselves.

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the District of Columbia Circuit, and that upon such a review that the decision and judgment of that Court be vacated, reversed, and set aside, and this cause remanded to the said Court of Appeals in accordance with the views of this Court.

CLAUDE L. DAWSON
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Washington 5, D. C.
Attorney for the Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12905

JOHN J. MURPHY, APPELLANT

v.

CHARLES E. WILSON, Secretary of Defense, et al.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided July 12, 1956

Mr. Claude L. Dawson for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney at the time brief was filed, *Lewis Carroll* and *Joseph M. F. Ryan,* Assistant United States Attorneys, were on the brief, for appellees. *Mr. Oliver Gasch,* United States Attorney, also entered an appearance for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge:* Appellant was involuntarily retired and placed upon an annuity. After exhausting

his administrative remedies he sought a mandatory injunction that he be restored to his post in government employment and a declaratory judgment that all proceedings looking to his retirement be adjudged void. Answer having been filed and the case having come on for trial, respective counsel stipulated that the facts are undisputed and that there were only two legal issues involved. The matter was submitted accordingly, and after arguments of counsel, the District Court entered judgment in favor of the appellees, and this appeal followed.

Appellant asserts that as a veterans preference eligible [1] he was entitled to the procedures set forth in § 14 of the Veterans' Preference Act.[2] He also claims that he was entitled to examine the evidence upon which the determination of his total disability was predicated and to a hearing. He is mistaken on both points.

Section 14 of the Veterans' Preference Act deals with privileges to be accorded to an eligible veteran when disciplinary action is taken against him. It sets forth specific procedures to be followed before such an employee "shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or barred for future appointment. . . ." It deals with "such cause as will promote the efficiency of the service. . . ." It has nothing whatever to do with his retirement for total disability within the meaning of the Civil Service Retirement Act.[3] In *Ellmore* v. *Brucker*,[4] we have had occasion to point out that retirement,

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[1] As defined in Section 2 of the Veterans' Preference Act, approved June 27, 1944, 58 STAT. 387, 5 U.S.C. § 851 (1952).

[2] 5 U.S.C. § 863 (1952).

[3] Act of May 22, 1920, 41 STAT. 614, as amended, 5 U.S.C. §§ 691-740 (1952), in particular § 710 thereof.

[4] No. 12855, decided today.

whether voluntary or involuntary, is not to be equated with removal from the classified civil service for cause, as provided for in the Lloyd-LaFollette Act.[5] So here; there is no difference in principle.

Neither the Retirement Act nor the regulations of the Civil Service Commission make provision for a hearing. In the administration of the Retirement Act, the Commission is not only authorized, but is directed to perform any and all acts for the purpose of effectuating its provisions.[6] Its duty is to make whatever inquiry may be necessary concerning disability,[7] and it may take or cause to be performed whatever other steps are necessary to its determination. Appellant does not challenge the Commission's authority to make such regulations as may be necessary and proper for the purposes of the Act.[8]

Instead, appellant in his brief next tells us he "demanded" that he be given an opportunity to examine any medical evidence in his file before the Board of Appeals and Review and to examine other evidence contained in his file. But both in the trial court and here, his contention with respect to the right to know or to examine the medical evidence in his file is related solely to his claim of a right to a hearing, which, as above noted, he was not entitled to receive under the Act.

There is no error and the judgment of the District Court is

Affirmed.

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[5] Act of Aug. 24, 1912, 37 STAT. 555, as amended, 5 U.S.C. § 652 (1952).

[6] 5 U.S.C. § 709 (1952).

[7] Cf. Robertson v. Chambers, 341 U.S. 37, 39 (1951).

[8] 5 U.S.C. § 709 (1952).

• • • •

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: July 12, 1956.

Per Circuit Judge Danaher.

• • • •

PETITION FOR REHEARING

The Appellant, John J. Murphy, prays that this Honorable Court grant a rehearing in this cause, and that the opinion of this Court rendered on July 12, 1956, be set aside.

Jurisdiction

This petition is filed within fifteen (15) days of the date of the opinion by this Court.

Reasons For Granting A Rehearing

This Court held that the Appellant, a permanent civil employee and a veteran preference eligible may be involuntarily retired from government service without a hearing, and without an opportunity to know the evidence against him.

It is deemed important to advise this Court that for many years the United States Civil Service Commission has held some sort of a hearing where there was an application for involuntary retirement, and that such an

employee was permitted to file affidavits, from lay and professional witnesses, such as physicians, in support of his or her contention that they were mentally and physically qualified to perform the duties assigned to them. In fact, counsel for the Appellant has in some cases called before the Board of Appeals & Review medical experts on the behalf of the employees to testify, by oral testimony, as to their examinations.

The Appellant was not accorded the usual and customary rights given to employees who were involuntarily retired. He was entitled under the practice and custom set up by the United States Civil Service Commission to the same rights granted to others. His request for a hearing was denied. It is not believed that the United States Civil Service Commission will deny that they have given hearings to other employees in like situation as this Appellant. This Appellant was not retired because he was unable to discharge his duties, but simply because his superiors knew they could not get him out of government service in any other way.

WHEREFORE, the Appellant prays that a rehearing be granted in this case.

/s/ Claude L. Dawson,
Attorney for the Appellant,
1012 - 14th Street, N. W.,
Washington 5, D. C.

I, Claude L. Dawson, counsel for the Appellant, do hereby certify that this petition for rehearing is filed in good faith and not for the purposes of delay.

/s/ Claude L. Dawson,
Attorney for the Appellant.

• • • •

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellant's petition for a rehearing, it is

ORDERED by the Court that the aforesaid appellant's petition be, and it is hereby, denied.

Per Curiam.

Dated: August 6, 1956.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	3
Conclusion	8
Appendix A	9
Appendix B	10

CITATIONS

Cases:	
Boske v. *Comingore*, 177 U. S. 459	6
Denby v. *Berry*, 263 U. S. 29	7
Ellmore v. *Brucker*, 236 F. 2d 734	5
English v. *City of Long Beach*, 35 Cal. 2d 155, 217 P. 2d 22	6
Robertson v. *Chambers*, 341 U. S. 37	3
Statutes and Regulations:	
Civil Service Retirement Act of 1930, as amended, 5 U. S. C. 691, *et seq.*:	
Section 709	10
Section 710	3, 7, 10
Section 711	7, 12
Veterans' Preference Act (58 Stat. 390, as amended, 5 U. S. C. 863), Section 14	2, 12
Civil Service Commission Retirement Regulations (5 U. S. C. Part 29 (1949 ed.)):	
Section 29.11	14
Section 29.11 (a)	4, 14
Section 29.15	4, 14
Section 29.15 (a)	14
Section 29.15 (b)	14
Section 29.15 (d)	14
Section 29.15 (f)	14
21 F. R. 3167	5

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 532

JOHN J. MURPHY, PETITIONER

v.

CHARLES E. WILSON, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (App. A, *infra*, p. 9) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (Pet. App. 1A–3A) is reported at 236 F. 2d 737.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (Pet. App. 4A). Petition for rehearing, timely filed, was denied on August 6, 1956 (Pet. App. 6A). The petition for a writ of certiorari was filed on October 29, 1956. The jurisdiction

of this Court is presumably invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Civil Service Retirement Act requires a hearing or disclosure of medical evidence when an employee is involuntarily retired on an annuity for disability.

2. Whether Section 14 of the Veterans' Preference Act is applicable to involuntary retirement for disability under the Civil Service Retirement Act.

STATUTES AND REGULATIONS INVOLVED

Section 14 of the Veterans' Preference Act (58 Stat. 390, as amended, 5 U. S. C. 863), the pertinent provisions of the Civil Service Retirement Act (5 U. S. C. 691, *et seq.*) and the retirement regulations of the Civil Service Commission (5 C. F. R. Part 29 (1949 ed.)), are set forth in Appendix B, *infra*, pp. 10–15.

STATEMENT

Petitioner is a veteran who was employed by the Department of the Army. He began his employment in December, 1948. Following a medical examination, the Army requested that he be retired for disability. After an appeal by petitioner to the Board of Appeals and Review of the Civil Service Commission, he was retired on an annuity as of September 3, 1954.

Thereafter, on September 20, 1954, petitioner commenced suit in the District Court in which he sought a mandatory injunction for restoration to his post in government employment and a declaratory judgment that all proceedings looking to his retirement be

adjudged void (R. 7A–12A). After filing of the answer, the case came to trial. It was orally stipulated that there were no disputed issues of fact and that only two legal issues were posed (R. 13A, 2A–6A). The District Court entered judgment for respondents, finding that the Veterans' Preference Act was inapplicable and that the Civil Service Retirement Act did not require a hearing or disclosure of medical evidence (R. 13A–14A), The Court of Appeals also ruled against petitioner on both contentions and judgment was affirmed (Pet. App. 1A–3A).

ARGUMENT

1. As petitioner admits, no provision of the Civil Service Retirement Act requires an adversary hearing or the disclosure of medical evidence before retirement of an employee. To the contrary, the Act contemplates an expert inquiry into the facts and not an adversary proceeding. Cf. *Robertson* v. *Chambers,* 341 U. S. 37, 39. The subject of this inquiry is whether a covered employee is "* * * totally disabled for useful and efficient service in the grade or class of position occupied by the officer or employee, by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on the part of the officer or employee * * *." 5 U. S. C. 710, *infra,* p. 10. And the Act directs this inquiry to be conducted by medical officers. It is specifically provided in 5 U. S. C. 710 that "[no] officer or employee shall be retired under the provisions of this section unless examined by a medical officer of the United States, or a duly qualified physician or surgeon, or

board of physicians or surgeons, designated by the Civil Service Commission for that purpose, and found to be disabled in the degree and in the manner specified herein." These provisions clearly authorize the Civil Service Commission to rely on the judgment of its own experts in determining the facts as to disability. There was no intention of turning retirement proceedings into a contest between experts.

Petitioner seems to contend that since the regulations, 5 C. F. R. 29.15, *infra*, pp. 14–15, permit an appeal from the decision of the Chief of the Civil Service Commission Retirement Division to the Board of Appeals and Review of the Civil Service Commission, an adversary hearing and disclosure of the evidence in petitioner's file is required. However, the regulations which permit an appeal also set forth the rules of procedure and the rules as to disclosure of evidence. Thus, "files, records, reports, and other papers and documents pertaining to any claim * * * will be deemed confidential and privileged * * *." 5 C. F. R. 29.11 (a) (1) But the regulations permit disclosure of the evidence "to a claimant or his duly authorized representative in matters concerning himself alone when such disclosure would not be injurious to the physical or mental health of the claimant or be regarded as a breach of confidence." 5 C. F. R. 29.11 (a) (2). Since the records in this case were not turned over to petitioner on his demand (R. 10A), it must have been concluded that such disclosure would either be injurious to petitioner's health or a breach of

confidence.[1] Reading the regulations as a whole, it is clear that the character of the proceedings and the rules as to disclosure of medical evidence were not intended to be affected by the provision for an administrative appeal.[2] While hearings may be granted in

[1] The regulations governing the disclosure of medical evidence were amended as published in the Federal Register of May 15, 1956 (21 F. R. 3167), and now provide that a summary of medical evidence submitted to the Commission shall be furnished, upon request, to an employee who contests the Commission's determination that he should be involuntarily retired for disability. This summary is furnished to such an employee when the nature of his disability is reported to be physical and of such a nature that there would not be a probability that the disclosure would affect him adversely. Where the nature of the disability is reported to be "a mental condition or other condition of such a nature that a prudent physician would hesitate to inform an individual found to be suffering from such a condition of its exact nature and probable outcome," a complete summary of the medical evidence, including background information, is to be made available to a physician designated by the employee concerned. The particular question here presented is thus no longer of general importance.

[2] In *Ellmore* v. *Brucker*, 236 F. 2d 734 (C. A. D. C.), a companion to this case, the court rejected appellant's contention that the Civil Service Regulations which authorized withholding of the evidence that was the basis of the determination of total disability were arbitrary. It said at p. 736:

"It is enough to say that Congress has not required disclosure of the medical basis for retirement, and, as we noted, appellant has had the benefits of the procedures prescribed by the Act. We must assume that when the Commission by its regulations has authorized certain protections, both for the Government and for the employee, it will accord to a claimant whatever benefits the regulations, properly administered, will permit. Certainly the Commission is not authorized to adopt necessary regulations, only thereafter arbitrarily to deny to a claimant the privileges so prescribed. To the extent that the regulations apply to his claim, he does not allege that the Commission did not do what the regulations authorized it to do. He does not say that the Medical

connection with some appeals, neither the Act nor the regulations require this. As petitioner points out, there are many instances in which a hearing is in fact granted in retirement proceedings. In such cases the Commission is no doubt confronted with inconclusive medical evidence and a hearing could benefit a claimant. Considering this practice of the Commission, the denial of a hearing to the petitioner indicates that the medical evidence left no question as to his disability so that a hearing would have been of no benefit to him. Petitioner contends only that the Civil Service Commission has misconstrued the regulations which it promulgated to implement the Civil Service Retirement Act. As we have shown, the Commission has been quite consistent, but in any event, courts will follow the administrative interpretation of administrative rules unless there is a clear error. *Boske* v. *Comingore,* 177 U. S. 459, 470.[3]

2. Section 14 of the Veterans' Preference Act, 5 U. S. C. 863, has no relation to retirement for total disability by a government employee. Petitioner, however, would have this Court treat his invol-

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Division was not authorized to determine that disclosure of information to be injurious to the physical or mental welfare of the appellant. The claimant really has been arguing for a full hearing to which he is not entitled. It is clear the Commission's files are 'deemed confidential and privileged,' and not to be disclosed except under named conditions."

[3] Petitioner refers to *English* v. *City of Long Beach*, 35 Cal. 2d 155, 217 P. 2d 22 (Pet. 14) as being in point as to the necessity for an adversary hearing. However, it should be noted that the California court, in holding that a new hearing should be granted to the complainant, relied on the specific provisions of the Long Beach city charter and rules and regulations of the civil service board that an employee be given an adversary hearing.

untary retirement which resulted from the finding under the Civil Service Retirement Act that he was "totally disabled for useful and efficient service" [4] as tantamount to discharge for cause or misconduct. This would be totally inconsistent with the fact that petitioner has been placed on an annuity because of medical disability and will continue to receive such annuity as long as he remains medically disabled.[5] And as this Court has recognized, "[n]o form of retirement is a removal by way of punishment." *Denby* v. *Berry*, 263 U. S. 29, 36. Congressional awareness of the distinction between removal for cause and retirement is apparent in a section of the Retirement Act, 5 U. S. C. 691 (c), which provides:

> Any officer or employee to whom this Act applies after having rendered at least twenty-five years of service computed as prescribed in section 707 of this title, shall, upon involuntary separation from the service not by removal for cause on charges of misconduct or delinquency, be paid an immediate life annuity computed as provided in section 698 of this title reduced by one-fourth of 1 per centum for each full month such officer or employee is under the age of sixty years. This subsection shall become effective as of July 1, 1945.

Thus, it is evident that the Veterans' Preference Act and the Civil Service Retirement Act serve different purposes and are independently operative in their

[4] See 5 U. S. C. 710, Appendix B, *infra*, p. 10.

[5] The Retirement Act provides for annual physical examinations to determine if annuitants remain disabled. 5 U. S. C. 711, Appendix B, *infra*, p. 12.

respective fields. The rulings of both courts below that the Veterans' Preference Act does not modify the Retirement Act were correct and do not call for review by this Court.

CONCLUSION

The opinion of the Court of Appeals is correct and there is no conflict with other decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
Attorney.

NOVEMBER 1956.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 4006–54

JOHN J. MURPHY, PLAINTIFF

v.

CHARLES E. WILSON, ET AL., DEFENDANTS

Memorandum

Judgment for defendant. Order accordingly. *Sawyer* v. *Stevens,* [95] U. S. App. [267], [221 F. 2d 822], cer. den. [348] U. S. [959] (No. 12073, decided November 10, 1954). *Hobbs* v. *Dulles,* C. A. No. 4339–54, defendant's motion for summary judgment granted, June 14, 1955, Judge Matthews.

I conclude further that the Veterans Preference Act is inapplicable in the circumstances. That particular Act relates to cases of "discharge, suspension, furlough without pay, reduction in rank or compensation, or disbarment from future appointment * * *."

(S) Matthew F. McGuire,
MATTHEW F. McGUIRE,
United States District Judge.

JUNE 16, 1955.

APPENDIX B

1. The Civil Service Retirement Act of 1930, as amended, 5 U. S. C. 691, *et seq.*, provides in pertinent part:

> § 709. For the purpose of administration, except as otherwise provided herein, the Civil Service Commission is authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.
>
> § 710. Any officer or employee to whom this Act applies who shall have served for a total period of not less than five years computed as provided in section 707 of this title, and who, before meeting the age and service requirements for retirement under section 691 (a) of this title, becomes totally disabled for useful and efficient service in the grade or class of position occupied by the officer or employee, by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on the part of the officer or employee, shall upon his own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired on an annuity computed in accordance with the provisions of section 698 of this title: *Provided,* That proof of freedom from vicious habits, intemperance, or willful misconduct for a period of more than five years next prior to becoming so disabled for useful and efficient service, shall not be required in any case. No officer or employee shall be retired under the provisions of this section unless examined by a medical officer of the

United States, or a duly qualified physician or surgeon, or board of physicians or surgeons, designated by the Civil Service Commission for that purpose, and found to be disabled in the degree and in the manner specified herein. No claim shall be allowed under the provisions of this section unless the application for retirement shall have been executed prior to the applicant's separation from the service or within six months thereafter. The time limitation for execution of claims for retirement under the terms of this section may be waived by the Civil Service Commission in case of an officer or employee who at the date of separation from service or within six months thereafter is receiving hospital treatment, but the application in such case must be filed with the Civil Service Commission not later than six months after the termination of such hospitalization; in the case of any such person heretofore separated from service application may be filed within six months after the effective date of this Act. Such time limitation may similarly be waived in the case of an officer or employee who at the date of separation from service or within six months thereafter is mentally incompetent, but the application in such case must be filed with the Civil Service Commission within one year from the date of restoration of such person to competency or the appointment of a fiduciary whichever is the earlier. Such time limitation may also be waived in the case of an officer or employee whose disabling condition is essentially chronic, deteriorative, or progressive in nature and can reasonably be assumed to have existed at date of separation, but the application in such case must be filed with the Civil Service Commission within one year after the date of separation; in the case of any such person heretofore separated from service, application may be filed within six months after August 8, 1949.

§ 711. Every annuitant retired under the provisions of sections 710–714 of this title unless the disability for which retired be permanent in character, shall at the expiration of one year from the date of such retirement and annually thereafter, until reaching age sixty, be examined under the direction of the Civil Service Commission by a medical officer of the United States, or a duly qualified physician or surgeon, or board of physicians or surgeons designated by the Civil Service Commission for that purpose, in order to ascertain the nature and degree of the annuitant's disability, if any. If an annuitant shall recover before reaching age sixty and be restored to an earning capacity which would permit him to be appointed to some appropriate position fairly comparable in compensation to the position occupied at the time of retirement, payment of the annuity shall be continued temporarily to afford the annuitant opportunity to seek such available position, but not in any case exceeding one year from the date of the medical examination showing such recovery. Should the annuitant fail to appear for examination as required under this section, payment of the annuity shall be suspended until continuance of the disability shall have been satisfactorily established. The Civil Service Commission may order or direct at any time such medical or other examination as it shall deem necessary to determine the facts relative to the nature and degree of disability of any officer or employee retired on an annuity under this section.

2. Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U. S. C. 863, provides:

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than

thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

3. The Civil Service Commission Retirement Regulations, 5 C. F. R. Part 29 (1949 ed.), provide in pertinent part:

> § 29.11 *Disclosure of information.* (a) (1) Files, records, reports, and other papers and documents pertaining to any claim filed with the Civil Service Commission, whether pending or adjudicated, will be deemed confidential and privileged, and no disclosure thereof will be made except as provided herein.
>
> (2) Disclosure of information from the files, records, reports, and other papers and documents shall be made to a claimant or to his duly authorized representative in matters concerning himself alone when such disclosure would not be injurious to the physical or mental health of the claimant or be regarded as a breach of confidence.
>
> Determination as to when disclosure of information would be injurious to the physical or mental welfare of a claimant will be made by the Medical Division.
>
> * * * * *
>
> § 29.15 *Appeals.* (a) An appeal may be taken to the Civil Service Commission, from the final action or order of the Retirement Division affecting the rights or interest of any person or of the United States under the civil-service retirement law, except as provided in this section.
>
> (b) Appeals must be filed by a claimant or a duly accredited representative, but no appeal shall lie to the Commission's Board of Appeals and Review until action has been completed by the Retirement Division. An appeal taken in behalf of a claimant by or through a representative who is not recognized by the Commission, or whose recognition has been canceled, shall not be entertained.
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> * * * * *

(d) Each appeal shall show the name and post-office address of appellant, his retirement claim number, the date and substance of the action from which the appeal is taken, and full reasons for the appeal.

* * * * *

(f) The mandate of the decision by the Board of Appeals and Review shall be carried into effect within 60 days from the date of the receipt of notice of the decision by the Retirement Division (except as hereinafter provided), unless the decision shall sooner be recalled. A proper explanation of the decision rendered shall be mailed to the appellant and/or his duly authorized representative by the Board of Appeals and Review.

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